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No. 06-926

IN THE

Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION
SUZUKI MOTOR CORPORATION
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS GENERAL MOTORS CORPORATION AND GM DAEWOO AUTO & TECHNOLOGY CO.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent General Motors Corporation states that it has no parent corporation. State Street Bank & Trust Company (acting in various fiduciary capacities for various employee benefit plans) is a publicly held company that beneficially owns more than 10% of General Motors Corporation's stock.

Respondent GM Daewoo Auto & Technology Co. states that it has no parent corporation. GM, though various subsidiaries, and respondent Suzuki Motor Corporation are publicly held corporations that own 10% or more of GMDAT's stock.

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INTRODUCTION

There is no conflict of federal authority on the questions presented by petitioner Daewoo America. The circuit courts agree that a district court's discretionary decision to extend comity to foreign proceedings or orders is reviewed for abuse of discretion — the standard applied by the Eleventh Circuit in this case when it affirmed the district court's decision to extend comity to the proceedings and orders of the South Korean court supervising the reorganization of Daewoo Motor Co., Ltd., petitioner's Korean parent. The case relied upon by petitioner is not to the contrary but in fact *agreed* that deferential review is appropriate when the district court abstains in the face of pending or available foreign proceedings. *Diorinou v. Mezitis*, 237 F.3d 133, 139 (2d Cir. 2001). Daewoo America consistently asserted below that it had an available forum in Korea for its tort and other damages claims, even though it consented under Korean law to the transfer of property about which it now complains. Based upon Daewoo America's own arguments and authority, the Eleventh Circuit applied the uniformly recognized standard.

The circuit courts are likewise consistent in their treatment of the preclusive effect of a court's order approving the sale of a debtor's assets. Every circuit that has considered the question has held that such a court-ordered transfer cannot be collaterally attacked through fraud and other damages claims directed at parties involved in the sale — even parties other than the debtor. *See, e.g., Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1018 (7th Cir. 1988) (Posner, J.). The case relied upon by petitioner does not dispute, much less reject, this

principle or otherwise demonstrate a split of authority, but instead turns on the existence of facts materially different from those in this case. *See Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260 (3d Cir. 1987). Any claimed error in the application of the uniform principle to the particular facts of this case does not demonstrate a legal conflict.

The result in this case would be the same in any circuit. Further, the Eleventh Circuit's opinion establishes that petitioner's claims fail as a matter of law for reasons independent of the grounds raised in its petition. Since the result could not change on remand, there is no basis for this Court's review and Daewoo America's petition should be denied.

COUNTERSTATEMENT OF THE CASE

Because Daewoo America's statement of the case is incomplete and inaccurate, GM and GMDAT present the following restatement of the facts:

A. Factual Background

This case arises from the corporate reorganization — the largest in Korean history — of Daewoo Motor Co., Ltd. ("Daewoo Korea") and the sale, approved by the Korean court supervising that reorganization, of some of Daewoo Korea's manufacturing and other assets. Before its reorganization, Daewoo-brand vehicles manufactured by Daewoo Korea had been distributed in the United States by its subsidiary, Petitioner Daewoo America. Pet. App. 2-3a. Daewoo America was represented by counsel in Daewoo Korea's reorganization proceedings, actively participated in those proceedings, and filed substantial claims accepted by the receiver

appointed by the Korean court. *Id.* at 3-4a. At no time did Daewoo America object to the sale of Daewoo Korea's assets; instead, it consented to the sale under Korean law. *Id.* at 5-7a; CRA Art. 270-2, Doc 126, Ex 33, Tab B.

In the course of Daewoo Korea's insolvency proceedings, Daewoo Korea and GM entered into negotiations concerning various Daewoo Korea assets. Pet. App. 4a. These negotiations led eventually to a Master Transaction Agreement ("MTA") entered into in April 2002 among Daewoo Korea, its creditors, and GM. The MTA, which was immediately widely publicized, provided for the creation of a new company, Respondent GM Daewoo Auto & Technology Co. ("GMDAT"), to acquire certain of Daewoo Korea's assets, including plants that manufactured vehicles distributed by Daewoo America. *Id.* at 5a. Debts and liabilities not included in the transfer remained the responsibility of debtor Daewoo Korea under the MTA; Daewoo America was not included in the assets to be transferred. *Id.*; Doc. 64 pg 13. When the MTA was entered into, the receiver in Daewoo Korea's insolvency proceedings notified Daewoo America that its distribution agreement with Daewoo Korea would be terminated. *Id.* at 6a. After receiving this notice, Daewoo America filed, on May 16, 2002, Chapter 11 proceedings in the United States Bankruptcy Court for the Central District of California. *Id.*; Doc 122, Ex 1 - Pg 210, 214.

Four months later, Daewoo Korea filed with the Korean Court a modified plan of reorganization, which embodied the terms of the MTA. Pet. App. 6a. Despite ample notice that it was excluded from the transaction, and the opportunity to raise any

objections — including that the sale would end Daewoo Korea's production of Daewoo-branded vehicles and thus end Daewoo America's distribution of those vehicles — Daewoo America chose not to object to the sale of Daewoo Korea's assets in the Korean proceedings or to take any action in Daewoo America's own Chapter 11 proceedings to oppose the sale. *Id.* at 7a.

Daewoo Korea's creditors adopted and the Korean court approved the modified reorganization plan and the MTA at a creditors meeting scheduled specifically for that purpose in September 2002. *Id.* By deciding not to exercise its right to attend that meeting or to vote on or object to the modified plan and asset sale, Daewoo America consented to them under Korean law. *See* CRA Art. 270-2, Doc 126, Ex 33, Tab B. Indeed, Daewoo America benefited from approval of Daewoo Korea's modified plan, *see* Pet. App. 70a n.45, by becoming U.S. warranty administrator for Daewoo vehicles with funding provided under the MTA — as Daewoo America's own evidence showed below. Doc 144, Ex. 2, Ex. 1 – pgs 13, 59; *see also* Doc 64 – pg 13. The asset sale and related transactions closed a month later. Pet. App. 7a. Daewoo America did not appeal the Korean court's plan approval. *Id*; Doc 122, Ex 1 – Pg 129-30.

B. Procedural History

1. Trial Court Proceedings

More than a year after public announcement of the MTA and the filing of its Chapter 11 case, and ten months after the Korean court approved the asset sale with its consent, Daewoo America filed an adversary action against respondents in the Bankruptcy Court for the Central District of

California. Pet. App. 7a. Daewoo America alleged that the transfer of Daewoo Korea's assets, and respondents' participation in that transaction, were wrongful under state law and violated the automatic stay that arose upon the filing of Daewoo America's Chapter 11 petition. The following year, after the bankruptcy court partially ruled on respondents' motions to dismiss Daewoo America's amended complaint,[1] the Judicial Panel on Multidistrict Litigation transferred the action to the United States District Court for the Middle District of Florida, where a number of similar actions brought by individual Daewoo dealerships were pending. *Id.* at 8a.[2]

In the Middle District of Florida, the parties submitted supplemental briefs addressing the deference owed to the Korean proceedings under the doctrine of international comity. *Id.* Daewoo

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[1] The bankruptcy court dismissed with prejudice Daewoo America's amended claims for unfair competition, violation of the Massachusetts Dealer Act, and violation of the California Cartwright Act. Pet. App. 8a. It dismissed with leave to amend the claim under the Florida Dealer Act. *Id.* Daewoo America did not seek leave to amend the complaint and did not appeal those rulings.

[2] The actions brought by individual Daewoo dealers were eventually dismissed with prejudice, and no appeal of the dismissal was taken. *See* Pet. App. 28a n.9; *see also* Br. of Appellant, 11th Cir. No. 04-15878-I, Ex. 2. It was the voluntary decision of the plaintiff dealers to forego any appeal, not (as petitioner asserts) the Eleventh Circuit's application of comity in this case, that "effectively shut the courthouse doors" to Daewoo America's dealer network and creditors. Pet. 13; *see id.* at 22.

America argued, among other things, that its tort and other damages claims against respondents were "common benefit" and civil claims under Korean law that survived Daewoo Korea's reorganization proceedings and could be pursued in a Korean court. Doc. 142, Cho Aff. ¶¶ 13, 33, 36-37; Doc. 139, at 16-19; Doc. 138 at 15-16. After a lengthy hearing, the district court dismissed Daewoo America's remaining claims with prejudice. Pet. App. 48a.

The district court first held, as a matter of law, that Daewoo America had no right under its distribution agreement to a continued supply of Daewoo vehicles, and there was no violation of the automatic stay under the Bankruptcy Code. *Id.* at 60-61a. In short, the foundation for Daewoo America's claims crumbled before the court reached the issues presented in its petition.

The court also exercised its discretion to extend comity to the Korean court's orders approving the Modified Plan and MTA, finding that "[Daewoo America] had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process" and hence if it "objected to the relevant transactions and orders, it should have done so before the Korean tribunal." *Id.* at 69-71a. The district court denied Daewoo America's motion for reconsideration, and entered judgment for defendants. *Id.* at 72-73a.

DMA appealed, claiming that the district court had erred in applying the comity doctrine and again arguing that its claims could be pursued in Korean court. Br. of Appellant, 11th Cir. No. 04-15878-I, at 9-11, 40, Ex. 1, Cho Supp. Aff. ¶¶ 14, 20; Reply Br. of Appellant, 11th Cir. No. 04-15878-I, at 14.

2. The Court of Appeals' Decision

The Eleventh Circuit affirmed the district court's judgment in its entirety. All three judges on the panel agreed that Daewoo America's claims were properly dismissed. The court first held that "the principle of international comity applied in this case is an abstention doctrine," and hence, consistent with other abstention doctrines, is reviewed for abuse of discretion. Pet. App. 10a. Notwithstanding this standard for reviewing the comity decision, the court reviewed legal conclusions de novo and factual findings for clear error. *Id.*

The court next examined Daewoo's claims under the Bankruptcy Code, reviewing de novo the district court's interpretation of Daewoo America's distribution agreement with Daewoo Korea. *Id.* at 12-13a; *see id.* at 39a, 43-45a. The court agreed with the district court that this agreement "did not grant Daewoo America property rights in vehicles that are neither manufactured nor sold by Daewoo Korea. . . . The rights of Daewoo America under the Distribution Agreement did not extend to the manufacturing assets of Daewoo Korea transferred by the MTA." *Id.* at 12-13a; *see id.* 44-45a. And because the transaction approved by the Korean court had no effect on any property of Daewoo America, GM's and the other defendants' participation in that transaction did not violate the automatic stay or other provision of U.S. bankruptcy law. *Id.* at 12-13a; *see id.* at 45-46a. Daewoo America does not challenge or seek review of these holdings in this Court.

The court also concluded that the district court properly exercised its discretion to extend comity to

the Korean reorganization proceedings and orders. *Id.* at 13-15a. Daewoo America "had notice of the proceedings in the Korean bankruptcy and an opportunity to participate in those proceedings"; it had notice of and knew about "the final meeting of the creditors on September 30, 2002, to vote on the Modified Reorganization Plan" that included the asset sale; but "chose not to attend the meeting...or otherwise object to the Modified Reorganization Plan." *Id.* at 14-15a.

Moreover, the "district court did not abuse its discretion when it determined that the interests of Korea in regulating business activity on its shores and the interests of the courts in dispersing a debtor's assets equitably and systematically outweighed the prejudice to Daewoo America...." *Id.* at 15a. Indeed, Daewoo America's argument "ignores that 'the interest of the system as a whole — that of promoting a friendly intercourse between the sovereignties — also furthers American self-interest, especially where the workings of international trade and commerce are concerned.'" *Id.* 15a (citations omitted).

Given its recognition of the Korean court's approval of Daewoo Korea's asset sale and modified reorganization plan, granted after notice to Daewoo America, the panel unanimously concluded that Daewoo America could not collaterally attack those orders through tort and other claims alleging the asset sale was wrongful. The panel majority (Pryor and Alarcón, JJ.) specifically rejected Daewoo America's argument that, because at least some of

its claims purportedly could not have been raised in the Korean bankruptcy proceeding,[3] the doctrine of comity did not apply, reasoning that "[t]he validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court." *Id.* at 16a. As a result, "[t]he complaint of Daewoo America regarding the effect of the MTA should have been raised before the Korean Court" and "Daewoo America cannot now collaterally attack that order by bringing claims against the

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[3] That Daewoo America's claims *could* have been raised in a Korean court was undisputed. The courts below did not, as Daewoo America asserts, merely "assume[] that all of petitioner's claims could have been raised in the Korean proceeding." Pet. at 8. Rather, GM submitted evidence that, under Korean law, Daewoo America could have objected to the receiver's termination of the distribution agreement and the Korean reorganization court's approval of the modified reorganization plan and MTA (and to appeal those decisions, ultimately, to the Supreme Court of Korea), based on the allegations in its amended complaint. *See* Br. of Appellee General Motors Corp., 11th Cir. No. 04-15878-I, Ex. 1; Song Affidavit ¶¶ 4-7. For example, Daewoo America could have asserted, in objection to the plan under Korean law, that the transfer of asserts and modified plan were unlawful or unfairly impaired Daewoo America's interests, and also could have raised those issues on appeal in Korea. *Id.* Daewoo America did not contest these points of Korean law in the proceedings below, but instead argued that its fraud and other tort claims had to be pursued in Korean civil court separate from the reorganization proceedings. Br. of Appellant, 11th Cir. No. 04-15878-I, at 9-11, 40, Ex. 1, Cho Supp. Aff. ¶¶ 14, 20; Reply Br. of Appellant, 11th Cir. No. 04-15878-I, at 14. The question of the particular Korean court(s) in which petitioner could bring its claims ultimately depends on the content of Korean law and is immaterial to the application of comity. *See* Part II, *infra.*

recipients of the property transferred based on the approval by the Korean Court." *Id.*

Judge Tjoflat, specially concurring, agreed that Daewoo America's claim of aiding and abetting breach of fiduciary duty, as well as the bankruptcy code claims, were properly dismissed under the doctrine of international comity. *Id.* at 37-38a. Because he did not believe that comity resolved all of Daewoo America's claims, however, Judge Tjoflat analyzed the remaining claims on the merits, concluding that Daewoo America failed to state any claim upon which relief could be granted. *Id.* at 20a, 39a, 40-46a.

According to Judge Tjoflat, the state law claims premised on Daewoo America's purported right under the distribution agreement to a continuous supply of vehicles failed to state claims because, as the court held, that agreement did not provide Daewoo America with any right to vehicles after Daewoo Korea stopped manufacturing them and did not restrict Daewoo Korea's right to sell its manufacturing assets. *Id.* at 45a.

For similar reasons, Judge Tjoflat concluded that Daewoo America's fraud claim was properly dismissed. That claim was based on allegations that in reliance on GM's supposed assurances Daewoo America would be included in the eventual transaction, Daewoo America refrained from exercising its purported right to "oppose the acquisition." *Id.* at 45-46a. But because it had no right under its distribution agreement (other than through the reorganization proceeding itself) to prevent Daewoo Korea from selling its manufacturing assets, Daewoo America could not as

a matter of law allege damages resulting from its failure to exercise this alleged "right." *Id.* at 46a.[4] Of course, Daewoo America knew by May of 2002 that it was not included in the transaction defined by the MTA. The proposition that it refrained from objecting to Daewoo Korea's plan of reorganization five months later based on a contrary assumption is not colorable.

Daewoo America petitioned the Eleventh Circuit for rehearing en banc, but no active judge asked that the court be polled on the petition and rehearing was denied. *Id.* at 74-75a. Throughout the proceedings in the district and circuit courts, Daewoo Korea's insolvency proceedings were ongoing in Korea. *See* Br. of Appellee GM at 7 (citing Doc. 122, Ex. 1 - Pg 43-44, 50, 102, 250).

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[4] Daewoo America's remaining allegations of harm were, according to Judge Tjoflat, simply too vague to support a fraud claim. Pet. App. 46a n.26 (citing Fed. R. Civ. P. 9(b)). Petitioner's assertion that Judge Tjoflat's fraud analysis would be unavailable on remand is simply incorrect. *See* Pet. 10 n.4. As Judge Tjoflat noted, the court of appeals may affirm on "any legal ground regardless of the grounds addressed, adopted or rejected by the district court." Pet. App. 20a n.1 (citing *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992)). Furthermore, Judge Tjoflat reviewed petitioner's entire amended complaint, claim by claim, in a 28-page opinion. That he ultimately concluded petitioner failed to state a claim as a matter of law provides no basis for petitioner's assertion that his understanding was "truncated" or that its fraud claim "has never been reviewed" in its "entirety." Pet. 10-11 n.4.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuit Courts Of Appeals On The Standard For Reviewing A District Court's Application Of International Comity.

The Eleventh Circuit stated and applied the same standard of review uniformly applied by the circuit courts, including the Second Circuit: it reviewed the district court's comity decision for abuse of discretion, its legal determinations de novo, and its factual findings for clear error. Pet. App. 10a; *see JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 422 (2d Cir. 2005) ("international comity is a form of abstention, and we review a district court's decision to abstain on international comity grounds for abuse of discretion"); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246-50 (2d Cir. 1999) ("We review a district court's decision to extend or deny comity ... for abuse of discretion"); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) ("since ... comity is within the court's discretion, we will reverse ... only [for] an abuse of discretion"); *see also Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1087 n.18 (9th Cir. 2006); *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003); *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001); *Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987); *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976); *see generally Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

Daewoo America ignores this wealth of authority articulating a uniform standard, relying instead on dicta in a single case, *Diorinou v. Mezitis*, which suggested that a de novo standard might apply when the district court considers whether to enforce a foreign judgment or "accept the adjudication of a foreign tribunal on a cause of action or a particular issue." 237 F.3d 133, 139-40 (2d Cir. 2001).[5] But as the authorities cited above demonstrate, *Diorinou's* dicta has not been followed, even in the Second Circuit, which uniformly applies a deferential standard in reviewing international comity decisions. *See JP Morgan Chase Bank*, 412 F.3d at 422 (2d Cir. 2005); *Finanz AG Zurich*, 192 F.3d at 246-50 (2d Cir.1999); *Allstate Life Ins. Co.*, 994 F.2d at 999 (2d Cir. 1993); *see also, e.g., Int'l Nutrition Co.*, 257 F.3d at 1329 (Fed. Cir. 2001) (applying abuse-of-discretion standard to extension of comity to French court's determination of issue of patent ownership).

Equally important, *Diorinou* itself recognized that deferential review is appropriate when the district court "considers whether to proceed with litigation properly within its jurisdiction because of the pendency or availability of litigation in a foreign forum." 237 F.3d at 139. Thus, even if *Diorinou's* dicta were an accurate statement of Second Circuit law, and both prior and subsequent decisions show it

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[5] The court in *Diorinou* did not purport to definitively resolve the issue, *see* 237 F.3d at 140, and because it affirmed the district court's judgment notwithstanding its plenary review, its comments about the appropriate standard of review were, in the end, immaterial to the outcome.

is not, there would still be no conflict with the abuse-of-discretion standard employed in this case. Daewoo America argued in the Eleventh Circuit that it had "common benefit" and civil claims against GM under Korean law that survived the Korean reorganization proceedings and which were available to it in Korea. Br. of Appellant, 11th Cir. No. 04-15878-I, Ex. 1, Cho Supp. Aff. ¶ 20; Doc. 142, Cho Aff. ¶¶ 36-37) GM disagreed, but given Daewoo America's own arguments to the lower courts, it cannot now complain about the Eleventh Circuit's characterization of comity as a form of abstention — a characterization that puts deferential review of the district court's decision squarely within what petitioner calls the "well-reasoned" analysis in *Diorinou*. Pet. 13.[6]

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[6] Daewoo America asserts, without any record citation, that the proceedings in Korea "have been completed." Pet. 17. The undisputed record before the Eleventh Circuit was to the contrary. Br. of Appellee GM at 7 ("DMA's claims approved by the Receiver remain pending in [Daewoo Korea's] insolvency proceedings, and DMA expects to receive payment under [Daewoo Korea's] reorganization plan.") (citing Doc. 122, Ex. 1 - Pg 43-44, 50, 102, 250). Also contrary to the record is Daewoo America's characterization of the Korean and U.S. reorganization proceedings as "consecutive," Pet. 11, when Daewoo America in fact filed its Chapter 11 proceeding in the U.S. in May 2002, more than four months before Daewoo Korea's creditors adopted and the Korean court approved Daewoo Korea's modified reorganization plan and the MTA. Pet. App. 6-7a. That Daewoo America decided to wait nine months after the transaction closed in Korea before filing its complaint against defendants in the U.S. proceedings, *id.* at 7a, hardly provides a justification for a more searching standard of appellate review.

Furthermore, other than its mistaken reliance on cases applying res judicata, petitioner does not explain why de novo review is more appropriate than the abuse-of-discretion standard uniformly applied by the circuit courts. Its assertion that there is "no good reason why *foreign* judgments should receive different treatment" from domestic ones, *id.* at 21, misunderstands the governing principles and the law. Application of res judicata to a "domestic" judgment is not discretionary. *See San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 345 (2005) ("There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'") (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)). By contrast, application of comity to foreign judgments or orders involves the exercise of discretion, *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), and, as Daewoo America acknowledges, Pet. 24, requires the court to weigh competing interests that are particular to individual cases. *Hilton*, 159 U.S. at 164.[7] No

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[7] Contrary to petitioner's assertions, Pet. 24, the Eleventh Circuit did not ignore this Court's instruction in *Hilton* to have "due regard" for the interests of U.S. citizens. *See* Pet. App. 13a (citing *Hilton*, 159 U.S. at 164); *compare* Pet. at 24. Instead, it held that the district court was within its discretion in weighing the competing considerations and concluding that Korea's interest "in regulating business activity on its shores," courts' interests in "dispersing a debtor's assets equitably and systematically," and America's self-interest in promoting "'a friendly intercourse between the sovereignties,'" outweighed any prejudice to U.S. creditors, Pet. App. 15a, which include Daewoo America and its unsecured creditors (the beneficiaries of petitioner's claims in this case). Pet. 4 n.2; *id.* at ii. This is

purpose is served by de novo review, which would require the reviewing court to re-weigh the relevant facts and exercise independent discretion, without any corresponding gains in uniformity. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("'Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.'") (quoting *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

Finally, a remand on the standard of review would not change the outcome in this case. An erroneous application of a deferential standard of review matters only if the reviewing court disagrees with the lower court's conclusions but was constrained to affirm notwithstanding its disagreement. *Cf. Salve Regina College v. Russell*, 499 U.S. 225, 237 (1991) (noting that in many cases, "the application of a rule of deference in lieu of independent review will not affect the outcome of an appeal"). There is nothing in the Eleventh Circuit's opinion indicating any disagreement with the district court's analysis, or suggesting that the outcome in any way depended on deferring to the

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particularly true where, as here, Daewoo America (who as debtor in possession under Chapter 11 had a fiduciary duty to act in the best interests of its own creditors) knew of and participated in the Korean proceeding, and consented to the modified reorganization plan that included the MTA. That Daewoo America's creditors claim they might fare better under U.S. law does not bar application of comity. *Canada S. R. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) (dismissing claims of U.S. creditors as barred by Canadian reorganization plan).

district court's discretion. Indeed, the opinion suggests the opposite.

For example, the court agreed, after de novo review, that the distribution agreement did not give DMA the rights it claimed. Pet. App. 12a. All three judges on the panel thus rejected the foundation for all of DMA's claims — *i.e.*, its purported right or expectation of continuing as a distributor of Daewoo vehicles after Daewoo Korea sold its assets and exited the business. Similarly, the panel majority scrutinized the district court's conclusion that Daewoo America's claims were impermissible collateral attacks on the Korean court's orders. Like the district court, the panel majority concluded that Daewoo America's claims "arise out of the same nucleus of operative facts considered by the Korean court. . . . The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court." Pet. 16a; *see id.* at 17a. This holding reflects independent review and agreement with the district court's analysis, not mere deference.

In short, the purported conflict in the standard of review asserted by Daewoo Korea is illusory and provides no basis for granting the writ.

II. The Eleventh Circuit's Decision Is Consistent With The Law Applied By The Other Courts Of Appeals, Including The Third Circuit In *Remington Rand*.

There is no conflict of federal authority regarding the preclusive effect of a court's order approving the sale of a bankrupt debtor's assets. Every circuit to consider the question has held that fraud and other tort claims attacking or arising out of a domestic

court-ordered asset transfer — whether or not actually litigated in the reorganization proceedings, and even when brought against parties other than the debtor — are barred as improper collateral attacks on the sale proceedings. *See In re Met-L-Wood Corp.*, *supra*, 861 F.2d at 1018 (7th Cir. 1988) (holding that court's approval of asset sale barred tortious interference and fraud claims against the purchaser and others involved in the sale); *see also Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 731-32 (8th Cir. 2004) (plaintiff "is barred from raising ... allegations of injury caused by fraud or the misappropriation of assets that [it] failed to raise before the bankruptcy court"); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1170 (10th Cir. 2000) (fraud and tortious interference claims against purchaser barred by order approving the sale); *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 28 F.3d 965, 970-71 (9th Cir. 1994) (antitrust claims); *Southmark Props. v. Charles House Corp.*, 742 F.2d 862, 869, 872 (5th Cir. 1984) (fraud claim was a "not-so-thinly veiled attack on the prior reorganization orders"; "Appellants cannot now undo a judicial decree which they had a full opportunity to contest, and chose not to.").

In *Met-L-Wood*, for example, a sale of debtor's assets was ordered and confirmed by the court supervising the debtor's reorganization proceedings. 861 F.2d at 1015. After the proceedings were converted into a liquidation, the Chapter 7 trustee sued the purchaser (and others involved in the sale) for damages, claiming that the purchaser's fraud in connection with that sale injured the unsecured creditors. *Id.* at 1016. The Seventh Circuit affirmed dismissal of the trustee's complaint, holding that the

fraud claims against the purchasers on behalf of unsecured creditors who consented to the sale were barred by res judicata. *Id.* Claims on behalf of other unsecured creditors (some of whom lacked notice of the sale) were likewise barred, not by res judicata, but by the special preclusive effect of bankruptcy court orders approving the sale of assets. *Id.*

As Judge Posner explained, orders approving the asset sale precluded plaintiff's fraud claims for damages, including claims against the purchaser, even though the claims did not technically seek to rescind the sale: "[Plaintiff's] suit does not seek to rescind the sale. But by seeking heavy damages from the seller, the purchaser, the purchaser's purchaser ... [and others] that benefited from the sale, the suit is a thinly disguised collateral attack on the judgment confirming the sale." *Id.*; *see also In re Int'l Nutronics, Inc.*, 28 F.3d at 970 ("[T]he rights of [asset purchasers] to their purchase at the agreed price would clearly be impaired or destroyed by a successful antitrust recovery."); *Southmark Props.*, 742 F.2d at 869 ("Notwithstanding appellants' protestations to the contrary, it is obvious that their state court suit attempts — by seeking to strip [the purchaser] and its successor in title of any benefits received as a result of the reorganization sale — to effectively nullify that sale"); *see also* Pet. App. 18a (holding that "Daewoo America seeks to redistribute the assets that were transferred with the approval of the Korean Court.").

As these cases make clear, barring such claims promotes the fair and orderly distribution of a debtor's assets by encouraging creditors to raise their objections to the court supervising the sale — the court that is charged with determining whether

that sale is in the best interest of the debtor's estate and all of its creditors. *E.g.*, *In re Int'l Nutronics, Inc.*, 28 F.3d at 970 ("There is little purpose in the court's confirming a sale if it has no power or duty to determine whether the terms of sale are in the best interests of the estate."). The contrary result urged by petitioner — to allow creditors like Daewoo America to consent to and benefit from the sale and then attack it through tort claims against the purchasers — would allow individual creditors to avoid the priorities set under bankruptcy law. This is particularly troublesome here because Daewoo America seeks to keep payments it received and will receive as a result of Daewoo Korea's modified reorganization plan, including serving as the U.S. warranty administrator for Daewoo vehicles, yet at the same time collect damages from a transaction it claims was wrongful. Such a result ultimately would discourage sales of a debtor's assets (or drive down the price), to the detriment of all creditors. *Met-L-Wood*, 861 F.2d at 1019 ("Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms — and the principal losers (pun intended) will be unsecured creditors.").

Far from "extending greater preclusive effect to a foreign judgment than is available to a domestic judgment," Pet. 12, the Eleventh Circuit's approach is precisely the same as the uniform treatment under U.S. federal law of a domestic bankruptcy court's order approving the sale of a debtor's assets. Daewoo America, as a putative creditor of Daewoo Korea, was not entitled to any recovery based upon the sale of Daewoo Korea's assets other than as

determined by the Korean court whose responsibility it was to adjudicate the respective rights of creditors. Under well established law, the Eleventh Circuit properly applied these principles to give effect to the Korean court's orders. *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) ("Unless all parties in interest, wherever they reside, can be bound by the [foreign reorganization] arrangement which it is sought to have legalized the scheme may fail. . . . [T]he true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."); *cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964) ("An inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question.") (citing *Hudson v. Guestier*, 4 Cranch (8 U.S.) 293, 294 (1807)). Indeed, none of the judges on the panel below doubted that international comity may be applied in this case to dismiss claims against parties other than the foreign debtor. *See* Pet. App. 38a (Tjoflat, J., concurring).

Nevertheless, Daewoo America claims that the Eleventh Circuit's decision conflicts with other authority. It first argues that, in barring claims against parties other than the debtor, the Eleventh Circuit's approach conflicts with a case in which the Third Circuit held that, without more, a foreign court's reorganization proceedings "cannot be used as a shield" by a party other than the debtor. *Remington Rand*, 830 F.2d at 1267. But in claiming such a conflict, Daewoo America ignores not only the authorities discussed above, but also both the facts

of *Remington Rand* and the Third Circuit's separate discussions of the effect of (i) orders approving reorganization plans, and (ii) orders approving the sale of a debtor's assets. Because the Eleventh Circuit's holding in this case was based not only on Daewoo Korea's bankruptcy proceedings (and approved reorganization plan), but also on the Korean court's specific approval of the debtor's sale of assets, Pet. App. 16a, the portion of *Remington Rand* relied on by Daewoo America is inapposite.

More to the point is the Third Circuit's separate discussion of the effect of a foreign court's order approving the sale of a debtor's assets. *Remington Rand*, 830 F.2d at 1266. In that discussion, which petitioner ignores, the court did not dispute, much less reject, the principle that an order approving the sale of a debtor's property barred claims against the purchaser. The court held only that the principle was unavailable on the facts before it because the complained-of transaction (the transfer of the debtor's trade secrets) was not approved by the foreign court and the plaintiff thus had no notice or opportunity to object to it. *Id.* In this case, by contrast, the district court found that Daewoo America had ample notice of and opportunity to object to the sale of assets which was specifically approved by the Korean court — a finding that Daewoo America does not challenge. The Third Circuit's conclusion in *Remington Rand*, based on materially different facts, does not conflict with the Eleventh Circuit's holding in this case.

Daewoo America's second argument is that its claims were not (and supposedly could not have been) litigated in the Korean reorganization proceedings, and hence the Eleventh Circuit's

approach conflicts with the "bedrock principle" that a party need not bring claims in a forum in which "it could not receive full relief." Pet. 27-29. In support, Daewoo America cites Eleventh Circuit cases applying this principle in determining the preclusive effect of domestic bankruptcy proceedings. *See In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1285 (11th Cir. 2006); *Kaiser Aerospace v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289 (11th Cir. 2001). But as these cases show, the question of the availability of "full recovery" depends not on whether the precise legal theories or claims could have been brought in the first forum, but rather whether plaintiff could have obtained complete relief by remedies available in that forum or, put differently, whether it could be "made whole" in the event its position was found meritorious. *See In re Atlanta Retail*, 456 F.3d at 1286; *In re Piper*, 244 F.3d at 1304. In both *Atlanta Retail* and *Piper*, plaintiffs could not obtain "full recovery" because their claims were independent of and separate from the court's approval of the reorganization plan, and therefore defeating the plan would not have vindicated the rights claimed by plaintiffs. *Atlanta Retail*, 456 F.3d at 1279, 1286 (holding that creditor's independent state law claim against another creditor was not barred "unless the resolution of that claim explicitly becomes an essential part of the bankruptcy plan"); *In re Piper*, 244 F.3d at 1304. By contrast, in this case, as the panel majority explained in distinguishing *Piper*, the "claims of Daewoo America rely entirely on the alleged invalidity of the transactions approved by the Korean court." Pet. App. 17a.

Regardless of how they are denominated, Daewoo America's objections and claims are "inextricably intertwined" with the MTA and modified plan, Pet. App. 18a, and therefore the Korean proceedings afforded Daewoo America an opportunity to obtain complete relief. The injury Daewoo America claims is the termination of its distribution agreement and the transfer of Daewoo Korea assets (but not Daewoo America itself) to GMDAT as provided by the MTA. The Korean forum gave Daewoo America a full and fair opportunity to attempt to defeat the modified plan and MTA, which (if successful) would have averted any alleged injury and rendered any claim for damages unnecessary and meaningless. Daewoo America admits as much in its petition, asserting that an indemnity provision covering claims "arising from the 'consummation of any Transactions'" under the MTA and modified plan covers *all* of its damages claims, including claims "based on respondent's conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from [Daewoo Korea]." *See* Pet. 29 & n.12.[8]

As the panel majority held, Daewoo America's "complaint ... regarding the effect of the MTA should

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[8] Petitioner's argument relying on the indemnification provision is frivolous. Pet. 29 n.12; *id.* at 24 n.8. That the parties to a court-approved transaction may have planned in advance for a particular class of contingencies (which arguably includes a potential collateral attack, no matter how meritless and contrary to law), and allocated the risk of those contingencies (no matter how remote), does not and cannot mean that a challenge to the transaction is somehow lawful.

have been raised before the Korean Court," Pet. App. 16a, a point on which Judge Tjoflat agreed in his concurrence. Pet. App. 38a ("Daewoo America cannot attack the MTA without also attacking the [Korean] Bankruptcy court's approval of it; the two are inextricably intertwined"). Any disagreement on the panel did not implicate the legal standard to be applied, but only its application to the particular claims asserted by Daewoo America. *See id.*

Similarly, petitioner is simply wrong in its assertion that the Eleventh Circuit's decision is "in serious tension if not outright conflict with" *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985), which petitioner claims held that "res judicata cannot bar a federal antitrust claim that was not within the jurisdiction of the state court that adjudicated the plaintiff's other claims." Pet. 27. In fact, *Marrese* held the opposite: "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." 470 U.S. at 380-81; *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (state court settlement had preclusive effect in federal court and barred even exclusively federal claims that plaintiffs could not have brought in the state court proceedings). Moreover, *Marrese* addressed the relationship of state and federal judgments in the federal system and the application of the Full, Faith and Credit Act, 28 U.S.C. § 1738. The question posed by that case — whether a prior state court's judgment extinguishes exclusively federal claims — has little bearing on whether the Eleventh Circuit properly abstained from deciding tort and other claims that Daewoo America itself argued arose not from any exclusively

federal right but were independently actionable under Korean law and could be brought in that country. In short, *Marrese* and like cases cited by petitioner (*see* Pet. 27-28) have nothing to do with comity in general or the comity issues raised in this case. *Cf. Banco Nacional de Cuba*, 376 U.S. at 415 n.17 (distinguishing a court's inquiry into the "validity of an act of an official of a foreign state under the law of that state" from a review among state courts; in the latter instance, there is "similarity of legal structure and an impartial arbiter, this Court, applying the full faith and credit provision of the Federal Constitution.").

* * *

However the Court resolves the two questions on which Daewoo America seeks certiorari, its claims were properly dismissed, independent of comity, under the panel's unanimous conclusion that Daewoo America's distribution agreement (which the court reviewed de novo) "is not reasonably susceptible to an interpretation that would give Daewoo America any rights in the vehicles manufactured by GMDAT and sold by Chevrolet and Suzuki." Pet. App. 13a; *see also id.* at 45a.

This conclusion bars all of Daewoo America's claims, including those that petitioner argues were independent of the asset sale approved by the Korean Court and "based on respondents' conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from [Daewoo Korea]." *See* Pet. 29. As Judge Tjoflat explained in his special concurrence, because the agreement did not guarantee Daewoo America a

"continuous supply of vehicles and parts, even after GM and its partners purchased the Daewoo Korea Plants," and did not "restrict Daewoo Korea's ability to sell" those assets, claims relating to the termination of the vehicle supply and subsequent use of the assets fail as a matter of law. Pet. App. 39-40a, 45a. The court's ruling on the interpretation of the contract likewise bars petitioner's fraud claim. Because Daewoo America had no right under the agreement to stop or object to Daewoo Korea's sale of its assets (outside of Daewoo America's right as a creditor to object during the reorganization proceedings — which it was free to exercise after it knew it would not be among the assets sold), it could not have been damaged, as Judge Tjoflat explained, by purportedly refraining to exercise any such right in reliance on GM's alleged assurances that it would be included in the contemplated transaction. Pet. App. 46a & n.26.[9]

Petitioner has not and cannot show that the Eleventh Circuit's decision was inconsistent with any federal authority, raises any important unsettled federal question, or that the Court's resolution of the questions presented will even affect the outcome of this case. Further review by this Court is unnecessary and unwarranted.

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[9] Given the panel's unanimous rejection of Daewoo America's interpretation of the distribution agreement that forms the foundation for its claims, there is no basis for Daewoo America's "hope" that it could overcome these alternative grounds on remand. *See* Pet. 10 n.4.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for *certiorari*.

Respectfully submitted,

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